

2-2101-9061-3

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE AFTON CITY COUNCIL

In the Matter of the Attorney  
Fees Regarding City of Afton  
Meeting Violation Litigation

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION

The above-entitled matter came on for hearing before Bruce D. Campbell Administrative Law Judge from the State Office of Administrative Hearings acting as a Hearing Examiner for the Afton City Council, on September 8, 1994 at 7:00 p.m. in the Afton City Hall Council Chambers, Afton, Minnesota.

The purpose of the public hearing was to take testimony from the principals and to receive comment from interested members of the public on the reasonable value of attorney services provided to Jon S. Kroschel, Mayor, Suzanne Flinsch, Councilperson, and Nicholas Mucciacciaro, Councilperson, in Thuma v. Kroschel, et al., and Kroschel, et al. v. City of Afton and the League of Minnesota Cities Insurance Trust, and the appeals arising from the two district court actions. The City Council has received advice from the City Attorney, pursuant to the holding of the Minnesota Court of Appeals in Kroschel v. City of Afton, 512 N.W.2d 351 (Minn. App. 1994), that the City has the discretion to reimburse Mayor Kroschel and Councilpersons Flinsch and Mucciacciaro for their legal fees and costs in the two actions and resulting appeals previously enumerated. The Administrative Law Judge was instructed to receive testimony regarding the propriety of the council exercising its discretion under Minn. Stat. § 465.76 (1990). The Council will, itself, take public testimony on that subject at a scheduled meeting of the City Council. This Report only contains the Recommendation of the Administrative Law Judge and supporting Findings and Conclusions related to the reasonable amount of reimbursable attorneys' fees and costs, if the Afton City Council, independently, decides to exercise its discretion under Minn. Stat. § 465.76 (1990).

Appearances: Thomas J. Radio and Karen R. Cole, Popham, Haik, Schnobrich & Kaufman, Ltd., Suite 3300, 222 South Ninth Street, Minneapolis, Minnesota 55402, appeared at the hearing for purposes of later advising the City Council on the subject matter presented; Judson D. Jones, Attorney at Law, 1625 Park Avenue, Minneapolis, Minnesota 55404-1694, appeared on his own behalf; and Jon E. Kingstad, Attorney at Law, 310 South St. Croix Trail, P.O. Box 318, Lakeland, Minnesota 55043, also appeared on his own behalf.

The record of the proceeding closed on September 15, 1994, with the receipt by the Administrative Law Judge of a Statement of Account by Mr. Jones.

This Report is a recommendation, not a final decision. The Afton City Council will make the final decision in this case, subject to approval by a Judge of the District Court, after a review of the record of this proceeding, which may adopt, reject or modify the Findings of Fact, Conclusions and Recommendations contained herein. Any person adversely affected by this Report should contact the Afton City Council to obtain the procedure for filing exceptions to this Report and presenting argument to the Council on the subject of the reasonable amount of attorneys' fees. Interested persons should contact Alex Wikstrom, City Manager, City of Afton, Afton City Hall, Afton, Minnesota, to ascertain the procedure for filing exceptions or presenting argument to the Council.

#### STATEMENT OF ISSUE

The issue to be determined in this proceeding is the reasonable amount of attorneys' fees incurred by Mayor Kroschel and Councilpersons Flinsch and Mucciacciaro, in Thuma v. Kroschel, et al., and Kroschel v. City of Afton and the League of Minnesota Cities Insurance Trust, and the appeals arising therefrom, if the City Council determines to reimburse such fees and costs under Minn. Stat. § 465.76 (1990).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

1. At all times material to this Report, Jon S. Kroschel served and still serves as the Mayor of the City of Afton. Suzanne Flinsch and Nicholas Mucciacciaro at all times material hereto served and still serve as members of the Afton City Council. The Mayor and Ms. Flinsch and Mr. Mucciacciaro constituted a quorum of the City Council in 1991 for purposes of the Minnesota Open Meeting Law, Minn. Stat. § 471.705 (1990).

2. On June 11, 1991, Mayor Kroschel and Councilpersons Flinsch and Mucciacciaro were attending a regular meeting of the Afton Planning Commission in the Afton City Council Chambers. Sometime before 7:45 p.m., Agenda Item 3, Parks Committee Report, was delivered by the Parks Committee Chairperson. At approximately 7:45 p.m., Kroschel, Flinsch and Mucciacciaro left the Chambers within which the Planning Commission was conducting its regularly scheduled meeting and met in City Offices in the City Hall. They discussed well drilling and the awarding of a contract to remedy a polluted water situation in the city park. Kroschel, Flinsch and Mucciacciaro returned to the Planning Commission meeting at approximately 7:53 p.m. At that time, the Mayor announced that, pursuant to his emergency powers as mayor, he would execute a contract for a new well with Mantyla Well Drilling Company.

3. On June 18, 1991, at the next regularly scheduled Afton City Council meeting, Councilperson Flinsch moved the introduction of Resolution 1991-17 captioned "Resolution Affirming and Ratifying the Mayor's Emergency Order for New Well in Town Park". The Resolution was seconded by Kroschel. Kroschel, Flinsch and Mucciacciaro voted to ratify the contract.

4. On November 14, 1991, Margaret H. Thuma, a resident of the City of Afton, filed a Complaint in the District Court against Mayor Kroschel and Councilpersons Flinsch and Mucciacciaro, alleging three separate claims for relief. Kingstad Ex. 1. The initial claim for relief asserted three separate violations of the Open Meeting Law and requested a civil penalty in the amount of \$100 for each of the three violations from each of the co-defendants to be paid to the City of Afton. In addition to the civil penalties, the first claim for relief requested a declaration that the three co-defendants had forfeited their right to serve on the City Council for the balance of their current term of office for three violations of the Open Meeting Law pursuant to Minn. Stat. § 471.705, subd. 1 (1990). The second claim for relief contained in the verified Complaint stated that Mayor Kroschel had acted in an ultra vires manner by executing the contract with Mantyla Well Drilling Company, since the contract was signed without authorization from the City Council. Finally, the third claim for relief alleged a violation of Minn. Stat. § 471.345 (1990), that \$4800 in public money was paid to Mantyla Well Drilling Company without receiving competing bids. No specific actions other than a declaration regarding the invalidity of the contract were requested in the second and third claims for relief. The Complaint for declaratory relief was brought against the mayor and two councilpersons individually and in their capacity as officials of the City of Afton. The City of Afton was not joined as a party to the proceeding.

5. The then city attorney advised the mayor and two councilpersons that the City had no duty to defend the three officials under either Minn. Stat. § 466.07, subd. 1 (1990) or Minn. Stat. § 465.76 (1990). The city attorney further advised the insurer for the City, the League of Minnesota Cities Insurance Trust, that, in his opinion, no defense of the public officials by the City or its insurer was required or appropriate. The city attorney declined to offer legal assistance to Mayor Kroschel and Councilpersons Flinsch and Mucciacciaro, even though they were faced with removal from office and additional declaratory relief.

6. On December 15, 1991, Mr. Judson D. Jones, Attorney at Law, 1625 Franklin Avenue, Minneapolis, Minnesota 55404-1694, agreed to represent Nicholas Mucciacciaro and Suzanne Flinsch in the proceeding at an hourly rate of \$150 per hour for all time spent on the file plus out-of-pocket costs. Jones Ex. A. Another lawyer officing in the same building as Mr. Jones, Dwight Penas, agreed to assist Mr. Jones with the file at a billable rate of \$120 per hour. Mr. Jones customarily charges between \$90 and \$180 per hour for his time, depending on the kind of case, the difficulty of the matter involved and the prospect for full payment. The hourly rate of \$150 per hour is at about the mid-point of the customary charges of Twin City attorneys of similar experience for such a proceeding. Jones Ex. A. All of Mr. Jones and Mr. Penas's fees were the personal responsibility of Ms. Flinsch and Mr. Mucciacciaro, although Mr. Jones advised them that the City might ultimately

responsible for reimbursement. Prior to engaging Mr. Jones, Ms. Flinsch, who is also an attorney, did do some work in the proceeding on a pro se basis.

7. Initially, Mr. Jones also performed some legal work on behalf of Mayor Kroschel. Kingstad Ex. 17. Sometime in late 1991, Mayor Kroschel agreed to be represented by Jon E. Kingstad in the Thuma v. Kroschel proceeding. Kingstad Ex. 17. Mr. Kingstad agreed to represent Mayor Kroschel for a fee of \$125 per hour. This is Mr. Kingstad's usual and customary fee

that he charges for cases that are likely to result in trial. Again, this hourly rate is at the mid-point or lower of Twin City area trial attorneys.

8. Prior to interjecting an Answer in the Thuma proceeding, the attorneys for the defendants deposed Ms. Thuma on two separate occasions. After the depositions, the defendants brought a Motion to Dismiss with a large number of supporting affidavits. Kingstad Ex. 2. It was the belief of the attorneys for the city officials that they would be successful in the Motion to Dismiss, eliminating later, greater costs associated with a full trial. Kingstad Ex. 2. The Motion to Dismiss was heard on January 31, 1992. The Court denied the defendants' Motion to Dismiss and scheduled a Rule 16 hearing to be held on April 10, 1992. Kingstad Ex. 3. On March 19, 1992, the defendants interposed an Answer in the Thuma proceeding. Kingstad Ex. 4.

9. On March 6, 1992, Messrs. Jones and Kingstad, on behalf of their clients, filed a petition in the District Court for declaratory relief, seeking a determination that the three city officials were entitled to indemnification from the City of Afton and the League of Minnesota Cities Insurance Trust for their legal fees under either or both Minn. Stat. § 466.07 (1990) and Minn. Stat. § 465.76 (1990). Kingstad Ex. 9. As part of the prayer for relief in the City of Afton proceeding, the three city officials sought a judgment against the City of Afton and the League of Minnesota Cities Insurance Trust for their attorneys' fees and expenses involved in prosecuting the claim for declaratory relief. Kingstad Ex. 9.

10. Since the Thuma case was proceeding to trial in the spring of 1992, counsel for Mayor Kroschel and counsel for Councilpersons Flinsch and Mucciacciaro had to prepare to defend on all claims for relief asserted in the verified Complaint, including the removal of the three officials from office. A two-day trial to the court was held on May 21 and 22, 1992. The trial court found that one non-intentional violation of the Open Meeting Law had occurred. The court found that the plaintiff had failed to present evidence to support its finding that defendants violated Minn. Stat. § 471.705, subd. 1(b) (1990). The court found that the mayor had no implied or express authority under Minnesota law to act without prior authority of the Afton City Council. Finally, the court found no violation of the Uniform Municipal Contracting Act since well drilling is a professional service exempt from the Act. Moreover, the water emergency would have rendered a second quotation impractical even if the statute applied. Kingstad Ex. 5. The court awarded costs to the plaintiff but made no provision for the attorneys' fees of the three councilpersons.

11. Defendants brought on a Motion for Amended Findings and a new trial which was heard in District Court on November 9, 1992. Kingstad Ex. 6. Because of the unavailability of counsel for the plaintiff, the hearing was rescheduled to a later time in the afternoon on November 9, 1992. The court denied the defendants' Motion for Amended Findings of Fact and for a new trial. Kingstad Ex. 6.

12. On December 21, 1992, an appeal of the Thuma action was taken to the Court of Appeals by counsel for the defendants. Kingstad Ex. 7. Although Judson Jones and Jon E. Kingstad signed the Notice of Appeal, the appellate work on this file was performed primarily by Jon Kingstad.



13. On September 7, 1993, the Court of Appeals rendered its decision in the Thuma case, affirming the trial court in part and reversing in part. Kingstad Ex. 8. The Court of Appeals affirmed the finding of one unintentional violation of the Open Meeting Law by the defendants on June 11, 1991. The Court also held that, as to Count 2 of the Complaint, the trial court did not have jurisdiction to consider the merits of the claim of an ultra vires act. The court declined to determine whether the trial court erred in refusing to dismiss the Count of the Complaint alleging a violation of Minn. Stat. § 471.345, subd. 5 (1990). The court declined to impose sanctions on appeal under Minn. R. Civ. P. 11 and Minn. Stat. § 549.21, subd. 2 (1990). Kingstad Ex. 8.

14. Subsequent to the decision of the Court of Appeals in the Thuma case, the defendants moved for review in the Minnesota Supreme Court of the finding of one unintentional violation of the Open Meeting Law by the defendants on June 11, 1991. On December 14, 1993, review by the Supreme Court was denied. Kingstad Ex. 8.

15. The councilpersons' declaratory action was the subject of a Motion for Summary Disposition by the City and the League of Minnesota Cities Insurance Trust in District Court. On July 12, 1993, the District Court granted summary judgment to the City of Afton and the League of Minnesota Cities Insurance Trust. Kingstad Ex. 12. The court determined that Minn. Stat. § 466.07 and Minn. Stat. § 465.76 (1990), imposed no duty on the City of Afton or the insurer to provide the three public officials with a defense. Kingstad Ex. 12. Finally, the trial court also granted summary judgment in favor of the League of Minnesota Cities Insurance Trust on its policy with the City, finding no coverage.

16. On August 15, 1993, the defendants appealed the Order Granting Summary Judgment to the City of Afton and the League of Minnesota Cities Insurance Trust to the Minnesota Court of Appeals. Kingstad Ex. 15. On March 8, 1994, the Court of Appeals affirmed in part, reversed in part, and remanded the matter back to the trial court. The Court of Appeals held that the City did not have a duty under Minn. Stat. § 466.07 (1990) to defend the Thuma action or to reimburse for costs and attorneys' fees incurred by the three city officials to defend the action. The court did, however, hold that under Minn. Stat. § 465.76 (1990), the City had the option, or discretion, to reimburse the three city officials for their costs and attorneys' fees incurred to defend the Thuma action. Finally, the court held that the League of Minnesota Cities Insurance Trust was obligated to indemnify city officials in the Thuma action if the Afton City Council determined that reimbursement was appropriate. Kingstad Ex. 16.

17. The League of Minnesota Cities Insurance Trust applied to the Minnesota Supreme Court for review of the Court of Appeals decision in the City of Afton declaratory judgment proceeding.

18. The reason that the Thuma action was so vigorously defended was that it potentially had the result of removing a quorum of the sitting City Council from their elected positions. Moreover, separate representation of the mayor and the city councilpersons was deemed appropriate by the defendants so that additional Open Meeting Law violations were not asserted in the course of the litigation outlined. Since the mayor had himself executed the well drilling

contract, he may also have had some liability, potentially, different from that of the city councilpersons, if any.

19. After the trial proceedings in the Thuma and City of Afton case, Mayor Kroschel and Jon Kingstad agreed that the attorney's fees generated by Mr. Kingstad in the two appeals would not be the financial responsibility of the mayor, if he paid his bill for the trial work in full. It was Mr. Kingstad's intention that his appeal fees would never be the personal responsibility of the mayor but would be paid by the City to Mr. Kingstad, if the appeals were successful.

20. The total number of hours expended by Mr. Judson Jones at \$150 per hour in Thuma v. Kroschel was 211.6 hours. The specific services provided are detailed in Jones Ex. B, taken from the contemporaneous billing records of Mr. Jones. Jones Ex. B.

21. The number of hours Mr. Dwight Penas spent on Thuma v. Kroschel at \$120 per hour was 67.8 hours. The detail of the work performed by Dwight Penas in the Thuma proceeding is also contained in Jones Ex. B.

22. Through February of 1993, the number of hours spent by Mr. Jones in Kroschel v. City of Afton, the declaratory judgment proceeding on coverage, was 52.7 hours. The detail of his work on the file is contained in Jones Ex. C. Dwight Penas did not provide professional services in the City of Afton proceeding.

23. The total charges to Ms. Flinsch and Mr. Mucciacciaro by Messrs. Penas and Jones were \$47,778 or a charge of \$23,889 for each of the two councilpersons. Ms. Flinsch has paid a total of \$603.67, leaving a balance of \$23,285.33. Mr. Mucciacciaro has paid a total of \$9,412.50, leaving a balance of \$14,476.50.

24. Apart from legal expenses incurred by Councilperson Flinsch, she has made actual disbursements in conjunction with the lawsuits as reflected in Flinsch Ex. 1-4, inclusive. Those direct expenses amount to \$848.61.

25. The number of hours for legal services that Mr. Kingstad billed in Thuma v. Kroschel prior to appeal, at \$125 per hour, was 88.72 hours. The number of hours that Mr. Kingstad billed for legal services to Jon Kroschel in the City of Afton case prior to appeal, at \$125 per hour, was 16.6 hours.

26. Of the total amount of \$13,652.50 billed to Mayor Kroschel by Jon Kingstad through December 31, 1992, for the two cases at the trial level, the entire bill has been paid by Mayor Kroschel.

27. Mr. Kingstad also provided services on the appeal in Thuma v. Kroschel and

Kroschel, et al. v. City of Afton and League of Minnesota Cities Insurance Trust. For his work on the Thuma appeal, Mr. Kingstad billed costs of \$1,587.64 and hourly fees of \$6,837.50. He thus claims payment for 54.7 hours working on the Thuma appeal and the costs previously noted. Kingstad 21. The expenses claimed for work on the Thuma appeal duplicate by \$18 costs paid by Ms. Flinsch, as reflected in Flinsch Ex. 3.

28. For his work on the City of Afton declaratory judgment appeal, Mr. Kingstad billed \$7,262.50 in hourly legal fees and expenses of \$252.72. At

\$125 per hour, Mr. Kingstad is claiming reimbursement for 58.1 hours of legal work on the City of Afton declaratory judgment appeal.

29. Mr. Kroschel and Mr. Kingstad had agreed that if Mayor Kroschel paid the bills for his trial work in full, Mr. Kingstad would not bill Mayor Kroschel for legal work on the appeals. Pub. Ex. 2. Mr. Kingstad would bill the City if the appeals were successful. This agreement was between Mayor Kroschel and Mr. Kingstad. The legal work reflected in Findings 27-28, supra, were not, however, ever the financial responsibility of Mayor Kroschel or either of the two councilpersons.

30. All of the hours of legal work charged by the three attorneys who worked on the files were made at their hourly rate and were actually performed by those three attorneys. No portion of the work was done by paralegals or clerical personnel. None of the work performed by the attorneys was suitable for performance by a lower paid employee of the attorneys. All clerical costs and similar amounts were absorbed by the attorneys in their office overheads.

31. It is appropriate to deduct from the billings of Mr. Jones and Mr. Kingstad \$125 each for the appearance before Judge Cass on November 9, 1992, the hearing on defendants' Motion for Amended Findings and a new trial, pursuant to an Order of Judge Cass dated November 16, 1992, and contained in the record as Kingstad Ex. 6, p. 2. It is not entirely clear from the individual billings by counsel whether this amount was charged to the three public officials involved. If it was charged by Mr. Kingstad and Mr. Jones is not an amount that was paid by the three councilpersons, but was paid by counsel for Ms. Thuma. Kingstad Ex. 6, p. 2.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS

1. The Minnesota Court of Appeals in Kroschel v. City of Afton, 512 N.W.2d 351, 355 (Minn. App. 1994), held that the City had discretion under Minn. Stat. § 465.76 (1990), to reimburse the three city officials for "any costs and reasonable attorneys' fees incurred by the person to defend charges of a criminal nature brought against the person that arose out of the reasonable and lawful performance of duties for the city or county".

2. If the City Council determines, on a separate record of a hearing before it, that reimbursement of attorneys' fees is appropriate, the hours expended by Mr. Judson Jones on behalf of Suzanne Flinsch and Nicholas Mucciacciaro in the case of Thuma v. Kroschel and Kroschel v. City of Afton the League of Minnesota Cities Insurance Trust are reasonable in number. The hours of legal services provided to the same individuals by Dwight Penas in

same two proceedings are reasonable in number. Moreover, the hourly rate of \$150 for legal services charged by Mr. Jones and \$120 for legal services charged by Mr. Penas are reasonable.

3. Ms. Flinsch should be reimbursed for the direct out-of-pocket expenditures reflected in Flinsch Ex. 1-4.

4. As a consequence of Conclusions 1-3, supra, it would be appropriate to compensate Suzanne Flinsch in the amount of \$23,889.00, with a lien on the proceeds to Mr. Jones and Mr. Penas for the unpaid balance, as well as \$848 in direct expenses, if the Council determines that reimbursement is proper under Minn. Stat. § 465.76 (1990).

5. As a consequence of Conclusions 1-2, supra, it would be appropriate to compensate Nicholas Muccicacciaro in the amount of \$23,889.00, with a lien on the proceeds to Mr. Jones and Mr. Penas for the unpaid balance.

6. The number of hours spent by Mr. Kingstad representing Mayor Kroschel in both the Thuma proceeding and the City of Afton proceedings at the trial level was reasonable. The hourly rate charged by Mr. Kingstad, \$125, was also reasonable. Kingstad Ex. 18.

7. Because Mayor Kroschel was never personally obligated to pay Mr. Kingstad for his work on the appeals of the two proceedings, the time expended by Mr. Kingstad on the appeals is not reimbursable under Minn. Stat. § 465.76 (1990).

8. The agreement between Mr. Kroschel and Mr. Kingstad regarding fees for appeal did not extend to Mr. Kingstad's out-of-pocket appeal costs.

9. As to the expenses claimed by Mr. Kingstad, there is an \$18 duplication of an expense item with a direct cost presented in Flinsch Ex. 1. That \$18 should be deducted from Mr. Kingstad's expenses.

10. As a consequence of Conclusions 6-9, supra, it is appropriate to reimburse Mayor Kroschel in the amount of \$15,449.54, with a lien on the proceeds in favor of Mr. Kingstad in the amount of \$1,797.04 for the unpaid appeal out-of-pocket costs.

11. Any Finding of Fact more properly deemed a Conclusion, and any Conclusion more properly deemed a Finding of Fact is hereby expressly adopted as such.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge to the City Council that it initially determine whether it is appropriate under Minn. Stat. § 465.76 (1990), to reimburse the three city officials for the reasonable amount of their attorneys' fees incurred in the two actions previously discussed. If the City Council, in its discretion, determines that it is

appropriate to provide compensation, then the reasonable amount of the compensation and its manner of payment is as stated in the previous Conclusions.



Dated this 23rd day of September, 1994.

s/ Bruce D. Campbell  
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BRUCE D. CAMPBELL  
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to send its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded - No Transcript Prepared.

MEMORANDUM

The Administrative Law Judge has been directed by the Afton City Council to determine a reasonable amount of attorneys' fees incurred by Councilpersons Nick Mucciacciaro and Suzanne Flinsch and Mayor Kroschel in defending Thuma Kroschel and in bringing Kroschel v. City of Afton and the League of Minnesota Cities Insurance Trust. The Council does not wish to receive from the Administrative Law Judge any recommendation regarding the propriety of the Council exercising its discretion to pay such reasonable attorneys' fees and costs pursuant to Minn. Stat. § 465.76 (1990). The Council will take evidence on that subject at a separate council meeting. Because a quorum of the City Council has a direct interest in the vote on reimbursement, the reimbursement, if any, will have to be approved by a District Court judge, if the Council decides to provide reimbursement to the council members and the mayor. Minn. Stat. § 465.76 (1990).

Before determining a reasonable amount of attorneys' fees under Minn. Stat. § 465.76 (1990), the Administrative Law Judge hereby receives into the record of this proceeding two late-filed exhibits which are the current statements of accounts from Jon E. Kingstad and Judson D. Jones as regards payment to them by their respective clients. The Administrative Law Judge also receives into the record the written statement by Mayor Kroschel as Public Exhibit 2. That statement was read into the record verbatim by Mrs. Kroschel at the hearing.

Minn. Stat. § 465.76 (1990), provides:

If reimbursement is requested by the officer or employee, the governing body of a home rule charter or statutory city or county may, after consultation with its legal counsel, reimburse a city or county officer or employee for any cost and reasonable attorney's fees incurred by the person to defend charges of a criminal nature brought against the person that arose out of a reasonable and lawful performance of duties for the city or county.

In Kroschel v. City of Afton, 512 N.W.2d 351 (Minn. App. 1994), the Court held that Minn. Stat. § 465.76 (1990) gave discretion to the Council to reimburse Councilpersons Mucciacciaro and Flinsch and Mayor Kroschel for their reasonable attorney's fees and costs involved in the two actions previously noted. The Court characterized the violation of the Open Meeting Law found to exist in Thuma v. Kroschel, 506 N.W.2d 14, (Minn. App. 1993), as an inadvertent violation of the Minnesota Open Meeting Law. The Court determined that such an inadvertent violation did not prevent compensation under Minn. Stat. § 465.76 (1990). Hence, the Administrative Law Judge must determine the appropriate amount of reimbursement to Mayor Kroschel and Councilpersons Mucciacciaro and Flinsch, if the Council determines that reimbursement is appropriate.

As an initial matter, the Administrative Law Judge must determine whether the fees of Jon E. Kingstad for the two appeals undertaken on behalf of the parties are compensable under Minn. Stat. § 465.76 (1990). The total amount of Mr. Kingstad's bills related to the two appeals is \$15,712.96, of which \$1,840.36 represents direct costs and \$13,872.60 represents hourly billings at \$125 per hour. Minn. Stat. § 465.76 (1990), allowed reimbursement "for any costs and reasonable attorney fees incurred by the person to defend charges of a criminal nature . . . ." In this proceeding, it is the position of Mayor Kroschel that while Mr. Kingstad should be compensated for the appeals, the cost of the appeals reflected in Mr. Kingstad's attorney's fees were not the personal responsibility of Mayor Kroschel. In Pub. Ex. 2, Mayor Kroschel describes his fee agreement with Mr. Kingstad to exclude the appeals. Mayor Kroschel states:

Prior to the Court of Appeals work, Jon and I worked out an agreement that stated if I paid off my billing in full, any appeals work would not be billed to me. This agreement was only between Jon and myself, and was not between Jon and anyone else. I feel Jon should also be compensated for work performed at the Court of Appeals level and the Supreme Court level. Had this work not been performed, specifically the Court of Appeals work, it is highly likely that the Appeals Court would not have ruled in our favor, and we would not be here tonight. Once again, considering the amount and value of work done on the appeals, I feel these bills are fair and reasonable. Thank you.

Pub. Ex. 2.

In his hearing testimony when he supplied for the record Kingstad Ex. 21 and 22, Mr. Kingstad clearly stated that these bills were not the financial responsibility of Mayor Kroschel and never had been. The following statements were made by Mr. Kingstad regarding his agreement with Mayor Kroschel related to the attorney's fees of Mr. Kingstad for the two appeals.

My agreement with Mr. Kroschel was that I would not bill him for the work on either of the appeals, but that basically it would be a matter of -- depending on whether we would be able to recover. I haven't necessarily ever expected to get this far with the case. I felt as though we wanted to get a justification for, we wanted to be able to show that we would be able to win the case before I submitted these but at this point I've got these bills which I've itemized and these are

also taken from my currently contemporaneously recorded billing. They are basically laid out in terms of increments of two tenths of an hour at my ordinary, usual rate of \$125.00 an hour for this type of litigation. I feel that these fees are reasonable fees. Fees were agreed to and I believe that they are reasonable considering the complexity of the case and given the experience I've had conducting litigation and other types of legal work in my approximately 18 years of legal experience.

Partial transcription of Hearing Tape 1.

It appears, then, that Mr. Kingstad, in consideration of Mayor Kroschel paying his bill for the trial legal work in full, would absorb the time spent in the appeals, but not the expenses, unless payment could be obtained from the City. In that event, it appears to have been Mayor Kroschel and Kingstad's intention that Mr. Kingstad be compensated for his fees directly by the City for the appeals.

The Administrative Law Judge has set out the evidence contained in the record regarding the fee agreement between Mayor Kroschel and Mr. Kingstad regarding payment of the attorney's fees involved in the two appeals. While the matter is not entirely clear, it appears to the Administrative Law Judge that Mr. Kingstad undertook to collect from the city, if the appeals were successful. The Administrative Law Judge believes that a fair interpretation of the agreement between Mr. Kingstad and Mayor Kroschel would not have allowed Mr. Kingstad to recover the appeal attorney's fees from Mayor Kroschel under any circumstances. Hence, since the legal fees for the two appeals were never the financial responsibility of Mayor Kroschel, he did not "incur" those attorney's fees within the meaning of Minn. Stat. § 465.76 (1990). In this proceeding, it is clear that Minn. Stat. § 465.76 (1990), was concerned with actual out-of-pocket legal expenses paid to an attorney, or payable to the attorney for which the official is responsible. In State, by Head v. Savage, 255 N.W.2d 32, 38-39 (Minn. 1977), the court held that a statute allowing recovery for "reasonable costs and expenses including fees of counsel" only related to actual cash expenditures that would not otherwise have been made. It disallowed recovery of attorney's fees where the attorney was in-house counsel and the client had no legal responsibility for additional fees.

The Administrative Law Judge understands the statement of Mayor Kroschel and the oral statements of Mr. Kingstad to be that Mr. Kingstad would attempt to recover his fees for the appeals from the City, if he were successful. The Administrative Law Judge does not believe that this undertaking by Mr. Kingstad is within Minn. Stat. § 465.76 (1990), because, under no circumstances, were these charges ever the legal responsibility of Mayor Kroschel.

Apart from Mayor Kroschel's responsibility for appeal fees, it is doubtful that a statute such as Minn. Stat. § 465.76 (1990) should be extended to

include appeals. City of Minnetonka v. Carlson, 265 N.W.2d 205, 207 (Minn. 1978).

No theory other than Minn. Stat. § 465.76 (1990), has been advanced to support recovery by Mr. Kingstad. If an additional legal theory is available to Mr. Kingstad which would support recovery, other than Minn. Stat. § 465.76 (1990), it should be presented to the City Council in response to this

Report. The Administrative Law Judge, therefore, determines that Minn. Stat. § 465.76 (1990), does not authorize the City Council to pay Mr. Kingstad the amounts contained in Kingstad Ex. 20 and 21, which represent legal fees, since these amounts were never the legal responsibility of Mayor Kroschel. The Administrative Law Judge does not believe that the same reasoning applies to out-of-pocket appeals costs. He, therefore, recommends payment of those costs.

As regards all other legal fees, other than the amounts represented in Kingstad Ex. 20 and 21, the reasonableness of an attorney's fee is a question of fact to be determined by the evidence submitted, the facts disclosed by the record of the proceedings, and the Administrative Law Judge's knowledge of the case. State v. Paulson, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971); Karlson v. Lange, Ltd. v. Beugen, 356 N.W.2d 733 (Minn. App. 1984); City of Minnetonka v. Carlson, 265 N.W.2d 205 (Minn. 1978). In Minnesota, in awarding attorney fees, there must be a "determination of reasonable value based upon proof thereof or the court's observation of the services performed". Larson-Roberts Electric Co. v. Burdick, 267 Minn. 486, 489, 127 N.W.2d 163, 165 (1964). The Administrative Law Judge had available a partial record of the proceedings in Thuma v. Kroschel, et al., and Kroschel, et al. v. City of Afton. Also, both attorneys testified under oath and gave contemporaneous billing statements with a description of services actually performed, the date on which the services were rendered, the amounts charged for such services, and the amount of all disbursements.

In determining the reasonable value of attorneys' fees, one must determine both that the billing rate is reasonable and that the amount of time expended in prosecution or defense of the matters under consideration is appropriate. In City of Minnetonka v. Carlson, 298 N.W.2d 763, 766-67 & n. 4 (Minn. 1980), the court set out nine factors under which the reasonableness of an award of attorney's fees is to be considered. These factors largely parallel the factors considered by the federal courts in determining recoveries of attorneys' fees under federal statutes. In Anderson v. Hunter, Keith Marshall & Co., 417 N.W.2d 619, 628 (Minn. 1988), the court expressly adopted the analysis of the United States Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), in determining the analysis to be employed in awarding attorney fees under federal statutes. Whether one adopts the analysis contained in Hensley v. Eckerhart, *supra*, or City of Minnetonka v. Carlson, 298 N.W.2d 763, 766-67 (Minn. 1980), and subsequent cases, it is clear that a multi-factor approach must be employed.

The Hensley decision requires, as a first step, that a "lodestar" figure be calculated by multiplying the hours reasonably expended in the matter by a reasonable hourly rate. The Supreme Court in Hensley and later decisions have approved consideration of a twelve-factor checklist in arriving at a reasonable and proper award of attorneys' fees. See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 714-17 (1987).

Blum v. Stenson, 465 U.S. 886, 897 (1984); Hensley, 461 U.S. at 434. These factors are as follows:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal services properly;
- (4) the preclusion of other employment by the attorney due to the acceptance of the case;
- (5) the customary fee;



- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) awards in similar cases.

The leading case discussing these factors is Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). Accord City of Minneapolis v. Carlson, 298 N.W.2d 763, 766-67 & n. 4 (Minn. 1980) (decided prior to Hensley; sets forth nine factors corresponding in large part to those discussed in Johnson). Although, in the past, courts calculated a lodestar figure and then considered these factors to adjust the figure so that it would be reasonable under the circumstances, "[r]ecent Supreme Court pronouncements on the subject . . . caution courts to take many of these factors into consideration when establishing the lodestar figure itself, and to award enhancements or reductions to the lodestar in only the exceptional case." Larson & L. Larson, Employment Discrimination § 58.20 at 11-106.47 (Matthew Bender 1990). Each of these factors thus will be considered in arriving at a reasonable amount of attorney's fees in this proceeding.

#### 1. Time and Labor Required

The Findings and the testimony of Mr. Jones and Mr. Kingstad, as well as their detailed time records, reflect the great deal of time and energy that was necessary to bring these proceedings to a successful conclusion. This case was vigorously defended at every stage of the proceedings. The Administrative Law Judge has carefully examined the detailed time records submitted by Mr. Kingstad and Mr. Jones, which also cover the time expended by Mr. Dwight Penas. The amount of time expended by each attorney at the trial level in these proceedings is broken out by .2 of an hour. The billings are taken from the contemporaneous time records of each attorney and the specific service rendered is also detailed. The Administrative Law Judge finds that the amount of time spent by the three attorneys on the two cases at the trial level is specifically substantiated in the record.

It was argued by members of the public that three lawyers should not have been used and that the resulting need for consultation between the attorneys inflated the ultimate total charge. The Administrative Law Judge does not believe that the City should be heard to complain on this subject. It was the city attorney who initially denied representation to the defendants and left them to their own devices, even though their removal from office was being sought. Moreover, since the three defendants constituted a quorum of the City Council and Open Meeting Law violations were being charged, the use of separate

counsel was entirely appropriate. The Administrative Law Judge will not "second guess" the attorneys involved regarding their trial strategy or the other strategic decisions made by them. The Administrative Law Judge does not find it appropriate to disallow any of the time spent by the three attorneys at the trial level.

## 2. Novelty and Difficulty of the Questions

This case presented, to the Administrative Law Judge's knowledge, a novel issue concerning the application of the Minnesota Open Meeting Law. It was also an unusual case under the Minnesota Open Meeting Law in that a single chain of alleged behavioral incidents was being used to attempt to remove a majority of the City Council. The difficulty of the questions involved was also compounded by the erroneous advice given by the then city attorney regarding the responsibility of the City to defend and the extent of its insurance coverage. The city attorney opined to the City and the insurer that there would be no coverage for any attorneys' fees incurred.

## 3. Requisite Skill

Adequate representation of the defendants in this case arising under the Minnesota Open Meeting Law statute requires litigation skills, as well as familiarity with municipal law. The attorneys involved in this proceeding, from the result obtained, were persuasive advocates for their clients and a review of the materials submitted to the trial court demonstrates that they were well-prepared and well-organized in presenting their case. The Administrative Law Judge has no doubt that Mr. Penas, Mr. Kingstad and Mr. Jones possess and displayed the skills requisite to performing the legal services provided properly.

## 4. Preclusion of Other Employment Due to Acceptance of the Case

There is no specific evidence that the attorneys were precluded from taking on any other particular matter by virtue of their representation of the defendants in these cases. The cases were, however, quite protracted over a number of years and did involve a significant expenditure of time by each attorney. The Administrative Law Judge does not consider this factor relevant in the determination of the reasonable amount of attorney's fees.

## 5. Customary Fee

In this proceeding, Mr. Jones charged an hourly fee of \$150 per hour for all work performed. He testified that his normal fee was between \$90 and \$120 per hour depending upon the specific case involved. He set the \$150 per hour fee in his fee agreement with the two councilpersons after considering the likelihood of recovery, the difficulty of the questions presented, and the need to wait a considerable period of time for payment. Mr. Kingstad billed his client \$125 per hour for all work performed. This was the normal fee customarily charged by Mr. Kingstad in his practice. Mr. Penas billed his client at \$120 per hour. This was also the normal billing rate of Mr. Penas. There is no evidence in the record that these charges were inflated by counsel due to the prospect of reimbursement by the City. The Administrative Law Judge finds, as testified to by both Mr. Jones and Mr. Kingstad, that the hourly fees billed

in this proceeding represent median fees for practitioners of similar skills in the Twin City metropolitan area. The determination of a reasonable hourly rate is dependent on the normal charge of attorneys of like skill in the area. Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1980); 4 Dun. Dig., Attorneys, § 12.12(c). No public commentator questioned the reasonableness of the rates sought by the three attorneys in this proceeding.

6. Fixed or Contingent Fee

The fees in this proceeding, except for the appeals, were fixed fees.

7. Time Limitations Imposed By the Client or the Circumstances.

There is no evidence in the record that this proceeding interfered with other matters being handled by the three attorneys. Accordingly, this factor is not relevant in this case.

8. Amount Involved and Results Obtained

It is true that the main action involved primarily violations of the Minnesota Open Meeting Law which carry a \$100 civil penalty for each violation proven. It should be noted, however, that the initial Complaint in this proceeding was drafted by counsel for Ms. Thuma to allege three violations of the Minnesota Open Meeting Law on the part of each defendant and seek the removal of each defendant from elective office. This would have required the disqualification of a quorum of the City Council and, presumably, new elections. While the monetary amount involved was, perhaps, small, the implications of this proceeding for representative government in the City of Afton were significant. The initial Complaint also sought a determination that the well drilling contract was invalid. This could have opened Mayor Kroschel to some later personal financial responsibility. The results obtained by the attorneys were satisfactory for the clients. Only one unintentional violation of the Open Meeting Law was found. The well drilling contract was upheld.

9. Experience, Reputation and Ability of the Attorneys

Mr. Kingstad and Mr. Jones are both seasoned trial attorneys with between 15 and 20 years spent in the practice of law. This factor has also been discussed above in the discussion of the time and labor required, the requisite skill of counsel, and the amount involved and the results obtained.

10. Undesirability of the Case

It does not appear that this factor is entirely relevant. However, the case may be somewhat undesirable from the fact that there appears to be a division of feeling in the City of Afton regarding the conduct of city government. It is entirely possible that Messrs. Jones and Kingstad alienated some potential clients by undertaking the defense of members of the City Council.

11. Nature and Length of the Professional Relationship with the Client

There is no evidence in the record regarding the nature and length of the professional relationship, if any, that any of the three attorneys had with clients prior to this case. Hence, this factor is not relevant.

12. Awards in Similar Cases

The Administrative Law Judge has not found a similar proceeding involving a violation of the Minnesota Open Meeting Law Act to compare the amount of award awarded. The Office of Administrative Hearings, however, in a number of

actions, has authorized the award of attorneys' fees at a rate of \$125 or \$150 an hour for time necessarily spent in the prosecution of cases before it. e.g., Vovk v. Tom Thumb Food Markets, Inc., 11-1700-4595-2, Award of Attorneys' Fees, November 4, 1991.

The Administrative Law Judge, after considering the factors deemed relevant by both federal and state courts, concludes that the hourly charges Messrs. Penas, Jones and Kingstad were reasonable, that the time and labor required for these proceedings were extensive, and that the hours expended by the three attorneys were reasonable. The hourly rates are consistent with the median range of fees normally charged in the Twin Cities metropolitan area. The amount of time spent is well documented by contemporaneous time records. Therefore, the Administrative Law Judge believes that the amount of reimbursement reflected in the Recommendation herein is a reasonable amount for attorneys' fees, if the City Council determines that reimbursement is appropriate.

As previously discussed, the Administrative Law Judge has disallowed compensation under Minn. Stat. § 465.76 (1990), for the time that Mr. Kingstad spent on the two appeals. This is entirely a matter of statutory interpretation and is not meant to reflect, in any manner, on the competency with which the appeals were brought, their necessity, or Mr. Kingstad's moral claim to payment. The Administrative Law Judge, simply, does not find that Kroschel was ever obligated to compensate Mr. Kingstad for that work. The Administrative Law Judge does not believe, therefore, that Mr. Kroschel "incurred" those fees within the meaning of Minn. Stat. § 465.76 (1990).

BDC